Supreme Court, U.S.
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No. 93-1293

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

SCINDIA NAVIGATION COMPANY, LTD.
and
THE SHIPPING CORPORATION OF INDIA,

Petitioners,

vs.

MICHAEL RIGGS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Can a vessel be held liable under 33 U.S.C. §905(b) when its negligence creates an unreasonably dangerous but open and obvious condition in the stow which the off-loading longshoremen must encounter notwithstanding the risk?

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Respondent Michael Riggs (hereinafter "Riggs") submits his Brief In Opposition To The Petition For Writ of Certiorari submitted by Petitioners Scindia Steam Navigation Company, Ltd. and The Shipping Corporation of India, Ltd. (collectively "the vessel") seeking review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on November 8, 1993.

STATEMENT OF THE CASE

Riggs, an experienced longshoreman, was discharging steel pipe bundles from the hold of the ship "Jalagopal" at the time of his accident. The steel bundles, each weighing several tons, had apparently been dumped into the hold by the foreign stevedores under the supervision of the vessel. Uncontradicted testimony evidenced a total lack of cargo separation or shoring of any kind.

Worse yet, numerous bundles were wrapped with plastic, making conditions slippery.

The stowage was thus exceptionally hazardous. Uncontradicted expert testimony credited by the district court established the following. The hazardous condition of the cargo stowage was open and obvious. The longshoremen working the hatch including Riggs used the only work method available to get the cargo out. No safer alternative work method was available. Nothing Riggs or his coworkers did caused or contributed to causing Riggs' accident.

As to vessel negligence, the uncontradicted testimony established that maritime custom and practice required the vessel through its officers to responsibly supervise the loading operation and ensure that stowage was done properly and safely. Ensuring proper stowage meant making sure that the cargo was loaded in such a way that it could be safely discharged in the off-loading port. Further, the uncontradicted testimony established

that the vessel had the obligation as a matter of maritime custom and practice to intervene and correct any improper stowage as it occured.

Given the condition of the stow, the vessel knew or should have known about the extremely hazardous nature of the cargo conditions, failed to intervene, and therefore acted negligently to create the factors which caused Riggs' accident. On these facts, Riggs sued the vessel for negligence under 33 U.S.C. §905(b). The vessel's sole argument in its own defense was that unreasonably dangerous defects in cargo stowage which are open and obvious cannot be the basis of vessel liability to a longshoreman.

REASONS FOR DENYING THE WRIT

I

RIGGS IS CONSISTENT WITH APPLICABLE STATUTES, LEGISLATIVE HISTORY AND LONG-STANDING PRECEDENT

The 1972 amendments to the Longshore And Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. ("LHWCA") dramatically altered the relationships of longshoremen to their employers and third parties. That transformation, however left vessel owners and operators liable for their own negligence. 33 U.S.C. 905(b). Although absolute liability, unseaworthiness and non-delegable duties vanished from the remedies available to injured longshoremen against vessel owners, Congress made it adamantly clear that longshoremen remained able to sue a ship owner for negligence just as a land-based worker could sue a third party for negligence. In language

which fully governs this case, the House Report stated:

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this Bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition."

House Report 92-1441, U.S. Code Congressional & Administrative News, Vol. 3, p. 4704 (1972). (Emphasis added).

The legislature's mandate has been followed consistently through this Court's precedents in Marine Terminals v. Burnside Shipping Company, 394 U.S. 404 (1969) and Scindia Steam Navigation Company, Ltd. vs. De Los Santos, 451 U.S. 156 (1981). Where vessel negligence has caused injury to longshoremen, actions for negligence have been permitted.

To state a case as why the Writ for Certiorari should be granted, the vessel mistakes the legal propositions at issue in Riggs. In truth, Riggs stands for the wholly unremarkable proposition that a person (including a vessel) may be held liable for its own negligence.

In urging novelty justifying review, the vessel contends that holding it liable for on-loading stevedore negligence is the equivalent of imposing absolute liability or unseaworthiness. Petitioner's Brief p. 11. The vessel totally ignores the records in Riggs. The undisputed testimony in Riggs, credited by the district court,

established as a matter of fact, that the vessel was negligent in failing to supervise and intervene in obviously improper loading operations and further that maritime practice and custom imposed such obligations. Thus, liability was not premised on some derivative form of liability such as respondeat superior or strict liability or some other form of burden-shifting but rather on unrebutted testimony that the vessel itself had acted negligently to cause the accident. Riggs has never attempted to claim anything other than that the vessel should be liable for its own negligence.

Second, the vessel argues that §905(b) does not reach vessel negligence concerning stowage as opposed to the ship and its equipment and fixtures. This is a distinction without a difference. Nothing in §905(b) or the legislative history limited vessel negligence to specific parts of the ship or equipment or fixtures as opposed to other kinds of negligence such as improper supervision of the crew. The vessel seizes upon non-exclusive

listings set forth in various cases and misses the essential point set forth in Scindia.

> "We held in Marine Terminals v. Burnside Shipping Co., 394 US 404, 415, 22 L. Edd 2d 371, 89 S. Ct. 1144 (1969), that the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care "under the circumstances". This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property."

Scindia at 451 US 166 (Emphasis added).

The key element to actionable vessel negligence is whether or not the longshoremen will be able by the exercise of reasonable care to discharge the cargo. Id.; Marine Terminal supra. at 394 U.S. 416-417 (1969). There is simply no basis in law, fact, reason or legislative intent to eliminate vessel-caused defects in stowage as a basis of actionable negligence.

II

NO BASIS UNDER RULE 10 JUSTIFIES REVIEW

Riggs is fully consistent with long-standing Ninth Circuit precedent holding that cargo can be the basis of a negligence claim against the vessel, Turner v. Japan Lines, Ltd., 651 F. 2d 1300 (9th Cir. 1981) cert. denied 459 U.S. 967, 103 S. Ct. 294, 74 L. Ed. 2d 278 (1982) and that open and

obvious conditions will not relieve the vessel of liability if the longshoremen must face the risk. Martinez v. Korea Shipping Corp., Ltd., 903 F. 2d 606, 609-10 (9th Cir. 1990). Wedding these two precedents compelled the conclusion that an open and obvious but unavoidable hazard in the cargo could serve as a basis for liability. As noted by the vessel, this precedent is long standing in the Fifth Circuit also. The Third Circuit holds to the contrary.

This court has granted certiorari in Howlett v. Birkdale Shipping Co., S.A., No. 93-670 which appears to address the precise issue in Turner not Riggs. That issue is whether or not the ship owner owes a duty of care with regards to unsafe conditions in cargo which are unknown to the longshoremen, not open and obvious and not normally anticipated. The only similarity between Howlett and Riggs is that they both involve cargo defects. Riggs however involves a much more extreme example of negligence in that the defects

of which Riggs complained must have been apparent to the vessel and its officers during the loading process whereas the hidden defects complained of in Howlett may not have been. Riggs does not constitute a decision in conflict with the decision in Howlett, at least as far as the question certified to this court. Riggs does, however, pose in the starkest terms possible the issue of whether or not a vessel may be held liable under any circumstances for defects in cargo stowage.

CONCLUSION

Riggs stands for the obvious proposition that a vessel is liable for negligence which causes injury to a longshoreman. That unremarkable proposition does not merit the grant of a Writ of Certiorari. Howlett, accepted by this Court for review, involves hidden defects in the stowage as a basis for liability thereby presenting quite

different facts and theories from those present in Riggs. Accordingly, Riggs urges the Petition For Writ of Certiorari be denied as the instant case does not fall within the considerations set forth in Rule 10 of the Rules of the Supreme Court.

Dated: 4-25-94

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